In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-838

EDWARD A. GREER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial with one Bartkus in the United States District Court for the Northern District of Illinois, petitioner was convicted of having transported between Greenfield, Indiana, and Chicago, Illinois, over 40,000 pounds of copper known to have been stolen from an interstate shipment, in violation of 18 U.S.C. 2314 (count 2) and of having conspired to steal the copper, conceal, and transport it in violation of 18

U.S.C. 371 (count 1).[1] He received concurrent sentences of five years' imprisonment. The court of appeals affirmed petitioner's convictions on count 1 but reversed his conviction on count 2 on grounds of insufficient evidence (Pet. App. A; 467 F. 2d 1064).

The evidence, the sufficiency of which is not challenged here, is outlined in the opinion of the court below (Pet. App. A2-A4). Petitioner's sole contention in this Court is that the prosecutor was guilty of misconduct when in the jury's presence he requested a continuance to obtain a rebuttal witness from Florida. The court below stated that if the petitioner had shown positively that there was no such witness (or if the government conceded there was none), this remark would warrant reversal (Pet. App. A13). Petitioner now claims that the court below should have remanded for a hearing to determine whether a witness in fact existed.

The circumstances surrounding petitioner's claim are as follows. On the final day of testimony, petitioner offered two alibi witnesses who testified to his presence in Florida when the offense was committed. After the defense rested, the court asked the prosecutor whether he wished to present any rebuttal evidence. The following colloquy then ensued in the presence of the jury (Tr. 488):

> MR. CAGNEY [the prosecutor]: Yes, we have one witness here and one tomorrow.
>
> THE COURT: Not tomorrow morning, conclude this afternoon.

[1] Co-defendant Bartkus was also convicted on each count. Three other co-defendants pleaded guilty. A fourth co-defendant was granted a severance on motion of the government.

MR CAGNEY: Based on what I heard here this afternoon, it will take me tonight to get the witness to fly up here from Ft. Meyer, Florida.

MR. BAILEY [petitioner's counsel]: I object.

THE COURT: You will conclude your rebuttal within a half hour. That's all I will allow. Proceed.

The prosecutor then called the rebuttal witness who was present. After this witness was cross-examined, the prosecutor once more asked for additional time to fly a witness up from Florida; the court again denied the request (Tr. 495).

Petitioner's contention (Pet. 13-14) that the court below imposed a novel burden upon him, which he has had no opportunity to discharge, is not well founded. There is no novelty in requiring that lawyers make the nature of their objections clear, and give the trial court a reasonable opportunity to take appropriate action. Petitioner now conjectures that the rebuttal witness in Florida was a fiction, and the request for continuance was simply a device to suggest to the jury that such a witness existed. As far as the record shows, counsel's objection at trial was directed to the grant of the extension, not to the good faith of the reason given for the request. If he doubted the good faith foundation for the request, he should have clearly so stated. The trial court could then readily have ascertained the identity of the potential witness. The court of appeals was not required to remand for a determination the petitioner failed to secure originally, due to the ambiguity of his objection. No further review by this Court is appropriate.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

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